Case No. 04-16087
Decision filed March 8, 2006
(Plager, J., and Trott, J.; Rymer, J. Dissenting)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOREEN HULTEEN, ET AL.

Plaintiffs and Appellees,

vs.

AT&T CORP.,

Defendant and Appellant.

On Appeal from the United States District Court
for the Northern District of California
Honorable Martin J. Jenkins, Presiding
Case No. CV-01-01122-MJJ

PETITION FOR REHEARING EN BANC

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Plaintiffs and Appellees Noreen Hulteen, Eleanora Collet, Linda Porter, Elizabeth Snyder, and Communications Workers of America, AFL-CIO (collectively "Plaintiffs"), respectfully submit this petition for rehearing en banc of the March 8, 2006 panel decision (Plager, J., and Trott, J.; Rymer, J. dissenting)[1] in this nationwide class action against defendant and appellant AT&T Corporation ("AT&T") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as amended by the Pregnancy Discrimination Act of 1978, Pub.L.95-555, 42 U.S.C. §2000e(k), effective April 29, 1979 ("the PDA").

I. INTRODUCTION AND STATEMENT OF COUNSEL

Fifteen years ago, in *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir.1991), a three-judge panel of this Court held that: (1) the Net Credited Service system ("NCS system") used by AT&T in this case to determine pension and other benefits for Plaintiffs upon retirement or termination of their employment is *facially* discriminatory because it "distinguishes between similarly situated employees: female employees who took leave prior to 1979 due to a pregnancy-related disability and employees who took leave prior to 1979 for other temporary disabilities"; (2) because it is not facially neutral, the NCS system is not a "bona fide seniority system" within the meaning of §703(h) of Title VII, 42 U.S.C.

[1] A copy of the panel's decision, authored by the Honorable S. Jay Plager, Senior Circuit Judge for the Federal Circuit, sitting by designation, is attached hereto for the Court's convenience in Appendix A.

§2003e-2(h) ("§703(h)") and, thus, each current application of the NCS system to determine an employee's pension benefits may be challenged as a separate Title VII violation; and (3) the controlling Supreme Court precedent for evaluating an application of the NCS system is *Bazemore v. Friday*, 478 U.S. 385, 395 (1986), which held that although an employer could not be held liable for acts of discrimination that occurred prior to the enactment of Title VII, an employer *could be* held liable for discrimination "perpetuated after the Act took effect." *Pallas*, 940 F.2d at 1326-27 (Schroeder, J., and Farris J.; Dumbauld, J., dissenting). As Judge Rymer points out in her dissent, slip op.at 2310-11, 2320, AT&T has not even tried to distinguish *Pallas* from the instant case; thus, if *Pallas* remains good law, it is dispositive of Plaintiffs' pregnancy discrimination claims.

Shortly after *Pallas* was decided, with the passage of the Civil Rights Act of 1991, Pub.L.102-166, Congress resolved an issue that arose in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 912, n.5 (1989), and was addressed in *Pallas*, 940 F.2d at 1326-27: *i.e.*, whether a seniority system adopted for a discriminatory purpose, but apparently neutral on its face, may be challenged each time it is applied. In that regard, Congress expressly confirmed *by statute* that an intentionally discriminatory seniority system such as the NCS system—*whether or not* the discrimination is apparent on the face of the policy—may be challenged each time an employee is "injured" by the application of the seniority system. 42

U.S.C. §2000e-5(e)(2) ("§706(e)(2)").

Flouting the standards established by this Court to determine when a three-judge panel may "overrule" an existing Ninth Circuit precedent—as well as the will of Congress expressed in §706(e)(2), and controlling Supreme Court authority recognized by the *Pallas* panel, *i.e.*, *Bazemore*, 478 U.S. 385—the majority of the three-judge panel in this case unceremoniously sweeps aside *Pallas*, holding that it must be overruled based on AT&T's overblown argument that a 12-year-old Supreme Court decision, *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), brought about a "sea-change" in retroactivity analysis, thereby reinterpreting the *Pallas* theory of Title VII liability as giving the PDA impermissible retroactive effect.[2] However, as Judge Rymer explains in dissent, *Landgraf* merely "refined" retroactivity law by defining the type of showing of Congressional intent required to overcome the strong presumption of prospectivity of new statutes, while reiterating principles announced almost 200 years ago in *Society for Propagation of the Gospel v. Wheeler*, 22 F.Cas. 756, 766-69 (1814), to determine whether a statute operates retroactively in a case where Congress has not clearly spoken.

Rehearing en banc is necessary to maintain uniformity of this Court's

[2] There is little doubt that AT&T's *Landgraf* argument was inspired by a passing comment in *Ameritech Benefit Plan Comm. v. Communication Workers of Am.*, 220 F.3d 814, 823 (7th Cir.2000), that "the PDA has not been treated as a retroactive statute." Although *Pallas* and *Ameritech* involved virtually identical facts, the Seventh Circuit reached the opposite conclusion, without any discussion of *Landgraf*, and without citing *Pallas*. However, *Ameritech* is not entitled to any weight in this Circuit, where *Pallas* is the governing precedent.

decisions because the majority disregards not only the controlling Supreme Court authority in *Bazemore* and the subsequent action of Congress codifying the timeliness principles upon which *Pallas* was based, but *also* settled rules established in en banc decisions of this Court, which permit a three-judge panel to "overrule" an existing Ninth Circuit precedent based on an intervening decision of the United States Supreme Court in extremely limited circumstances—*i.e., only* where the intervening Supreme Court case is "closely on point" *and* the prior three-judge decision is "clearly irreconcilable" with the intervening Supreme Court decision. *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 744, n.1 (9th Cir.2003) (en banc); *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir.2003) (en banc). As Judge Rymer cogently explains in her dissent, slip op.at 2312-16, *Landgraf* is not "closely on point" because it does not discuss, much less control, the *Pallas* panel's determination of what constitutes the actionable conduct in that case and this one; nor does it address *Pallas's* conclusion that the NCS system is facially discriminatory. As these are the dispositive rulings in *Pallas*, that Ninth Circuit precedent is simply *not* "irreconcilable" with *Landgraf.*

On the contrary, *even if* the majority is correct that AT&T's choice to discriminate against women who took pregnancy leave prior to 1979 was "perfectly legal" at the time, *see* slip op.at 2299-2300, there remains the question whether applying the PDA in the present circumstances would in fact give the

statute impermissible retroactive effect. *Landgraf* states general principles under which that determination may be made, but does not address—much less resolve—that issue in the present context. But *Pallas* does so, at least indirectly, noting that the plaintiff's claims for discriminatory denial of pension benefits did not accrue until after the PDA took effect and "could not have been brought earlier," and that, under the Supreme Court's *Bazemore* analysis, an employer is in any event liable for discrimination "perpetuated" after Title VII took effect *each time* a facially discriminatory policy is applied. *Pallas*, 940 F.2d at 1327; s*ee also Maki v. Allete, Inc.*, 383 F.3d 740, 742-44 (8th Cir.2004); *EEOC v. Bell Atlantic* 80 FEPC 164 (S.D.N.Y.1999); *Carter v. AT&T Co.*, 870 F.Supp. 1438, 1443-45 (S.D.Ohio 1994), vacated as a condition of settlement, 75 FEPC 866 (1996).

Critically, neither AT&T nor the majority of the three-judge panel explains precisely why *Landgraf* requires a reevaluation—much less the overruling—of *Pallas*. A finding that AT&T is liable for pregnancy discrimination under Title VII for its recent decisions to deny pension and termination benefits to Plaintiffs and other female employees who took pre-PDA pregnancy leave, simply does not depend upon a retroactive application of the PDA. As the *Pallas* Court clearly understood, AT&T's discriminatory decisions to award lesser benefits to Plaintiffs than to similarly situated employees who took *non*-pregnancy-related disability leaves prior to the effective date of the PDA were *current*, individualized

determinations made when and as each Plaintiff retired or terminated her employment in the mid-1990s and thereafter—*long after* the PDA took effect, and within the applicable limitations period under Title VII.

The majority's retroactivity analysis also fails adequately to account for *Bazemore* or §706(e)(2), under which an unlawful employment practice ("UEP") "occurs" within the meaning of Title VII *each time* a facially discriminatory seniority system—such as the NCS system in this case—is applied to and "injure[s]" an employee. Indeed, if the majority's retroactivity analysis were applied to the claims of race-based salary discrimination in *Bazemore*, it would inexorably follow that the Supreme Court in *Landgraf* overruled not only *Pallas*, but *Bazemore* as well. Yet we know that the Supreme Court discussed *Bazemore* with approval in *Nat'l Railroad Passenger Corp. v. Morgan*, 536 U.S. 100 (2002), explicitly referring to the *Bazemore* paychecks as actionable components of a discriminatory compensation system, even though the initial salary discrimination in that case began long before the effective date of Title VII. 536 U.S. at 111-13 ("[e]ach discrete discriminatory act starts a new clock for filing charges" challenging that act, regardless of whether other acts also could have been, but were not, challenged at an earlier date). In short, the Supreme Court authority and the Title VII timeliness principles that governed in *Pallas*—and here—were in no

way diminished by *Landgraf,* and the majority of the three-judge panel erred by relying on that decision as a basis for "overruling" *Pallas*.

II. PETITION FOR REHEARING EN BANC

AT&T freely admits that it continues to discriminate on the basis of pregnancy, and that Plaintiffs receive reduced pension benefits because AT&T denies them service credit for pregnancy leaves they took in the 1960s and 1970s, before the effective date of the PDA, whereas employees who took leave for other types of temporarily disabling conditions during that period receive day-for-day credit. The central issue in *Pallas*, and in this case, is *when* the UEPs alleged in the complaint "occurred" within the meaning of Title VII.

The text of Title VII, along with relevant Supreme Court and Ninth Circuit precedents, including *Bazemore* and *Pallas,* establish the governing rule: Every time an employer makes a decision under a facially discriminatory policy, the employer commits a new act of discrimination that triggers a fresh limitations period. *See also* §706(e)(2). Under this rule, AT&T commits a new UEP each time it applies a formerly pregnant employee's NCS date—a date borrowed from its facially discriminatory seniority system—in calculating her Term of Employment ("TOE"), thus reducing her pension and other benefits upon retirement or termination of employment.

The majority erred by resorting to the *Landgraf* analysis to assess these *current* violations, because they do not depend upon a retroactive application of the PDA. Even if retroactivity inquiry were appropriate in this case, however, there is nothing "new" about the *Landgraf* retroactivity analysis that requires a different result than obtained in *Pallas*. Put another way, nothing in *Pallas* is "clearly irreconcilable" with the intervening decision in *Landgraf,* and the latter case provides no basis for overruling the former.[3] Because *Pallas* survives as binding Ninth Circuit precedent, the three-judge panel should have honored that decision and affirmed the summary judgment for Plaintiffs in this case.

A. The Majority Exceeded Its Authority In Deciding It Was Free To Overrule *Pallas* Because *Landgraf* Is Not "Closely On Point," And *Pallas* Is Not "Clearly Irreconcilable" With *Landgraf.*

The majority misstates and misapplies binding Circuit caselaw that establishes a three-judge panel's authority to "overrule" a Ninth Circuit precedent based on intervening Supreme Court authority. Indeed, the majority relegates the issue of its authority to "overrule" *Pallas* to a footnote, citing *Miller v. Gammie,* but otherwise ignoring the rule of that case, saying simply that

> "It is hornbook law that decisions of circuit courts of appeals yield to conflicting decisions of the Supreme Court. Both the

[3] Nor do any of AT&T's arguments under *Morgan* and *Teamsters* require the overruling of *Pallas*. Those arguments are simply variations on the theme that AT&T, and apparently two judges on the panel, would have preferred that the *Pallas* Court rely upon *United Air Lines v. Evans*, 431 U.S. 553 (1977) instead of *Bazemore*—as the Seventh Circuit did in *Ameritech,* 220 F.3d 814. Judge Rymer's dissent cogently discusses and dispatches AT&T's arguments under *Morgan* and *Teamsters,* and those issues require no further elaboration at this time.

> Ninth Circuit and the Federal Circuit, as well as other circuits, recognize that a panel is bound to follow the latter, not the former."

Slip op.at 2298, n.3. Contrary to the position staked out by the majority, however, a three-judge panel may overrule a prior decision of a three-judge panel *only* where an intervening Supreme Court case is "closely on point" *and* the prior panel's decision is "clearly irreconcilable" with the intervening Supreme Court decision. *EEOC v. Luce, Forward*, 345 F.3d at 744, n.1; *Miller v. Gammie*, 335 F.3d at 899-900. Here, the majority erred in concluding that any perceived "conflict" with *Landgraf* is sufficient to permit it to "overrule" *Pallas*.

B. Holding AT&T Liable Under The Rule Of *Pallas* For Current Use Of Its Facially Discriminatory NCS System To Deny Pension Benefits To Plaintiffs Does Not Entail An Impermissible Retroactive Application Of The PDA Under *Landgraf*.

AT&T's principal claim of error in this interlocutory appeal was a more elaborate, overheated version of an argument it made below, to wit: Although *Pallas* is on all fours with this case, it involved an impermissible retroactive application of the PDA, which that court failed to discuss and which cannot withstand scrutiny under the Supreme Court's intervening decision in *Landgraf*, 511 U.S. 244. AT&T's passionate rhetoric and melodramatic flourishes cannot compensate for serious analytical flaws in its argument. The majority plainly erred by accepting this argument as grounds for overruling *Pallas*.

1. The Clarification of Retroactivity Analysis in *Landgraf* and Other More Recent Cases Does Not Mean That *Pallas* Gave the PDA Impermissible Retroactive Effect.

In *Landgraf*, 511 U.S. 244, the Supreme Court established a two-part test for determining if a statute may be applied retroactively: First, the court "must determine whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280. If so, and there is no constitutional impediment, there is no need to resort to judicial default rules. *Id.* at 265-68, 280. However, if Congress has *not* clearly stated its intent, "the court must determine whether the new statute would have *retroactive effect*, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280.

A statute does not have an impermissible retroactive effect merely because it "draws upon antecedent facts for its operation," or "upsets expectations based in prior law." *Id.* at 269-70 & n.24. "Rather, the court must ask whether the new provision attaches *new legal consequences* to events *completed* before its enactment. The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 270. In considering a law's retroactive effect, the

court's analysis is guided by three "familiar considerations," *i.e.*, reasonable reliance, fair notice, and settled expectations. *Id.* at 280.

In *Landgraf,* there was no question about which past events or conduct by the defendant were "relevant" for purposes of the Court's retroactivity analysis, or *when* those acts occurred. It was beyond dispute that the "new" statutory rights to recover damages in a jury trial arose only as to specific conduct that could give rise to a "hostile environment" harassment claim—conduct that occurred in 1986, long before the statute was enacted. 511 U.S. 247-49, 283-84.

This Court had occasion to consider that issue, however, in *United States ex rel. Anderson v. Northern Telecom, Inc.,* 52 F.3d 810 (9th Cir.1995), and held that it is crucial to identify the specific conduct allegedly affected by the new statute:

> Retroactive application of a law means that it changes the legal consequences of conduct that took place before the law went into effect. *If, however, the law changes the legal consequences of conduct that takes place after the law goes into effect, the law operates on that conduct prospectively.* That is, so long as Congress establishes the legal consequences of conduct prior to the conduct taking place, *there is no issue of retroactivity.*

52 F.3d at 814-15, italics added. As we will discuss, because the discriminatory conduct at issue in this case occurred in and after 1994, *long after the PDA's effective date,* retroactivity is simply not an issue here.

2. *Pallas* Did Not Give Impermissible Retroactive Effect to the PDA.

The majority uncritically accepted several of AT&T's overblown arguments

that *Pallas* gives the PDA impermissible "retroactive" effect, to wit: (1) *Pallas* created new obligations or liabilities with respect to "completed" conduct or transactions—*i.e.*, the employees' pre-PDA maternity leaves—and "clearly upset...settled expectations" that the 1979 amendments to the service crediting rules would have prospective effect only; and (2) *Pallas* "changed the legal consequences of the Bell System's treatment of pre-PDA pregnancy leaves" by converting what was—by its lights—a "perfectly legal" form of discrimination against pregnant women before April 29, 1979, into a practice that violated Title VII thereafter. The majority erred in relying on these arguments to overrule *Pallas*.

Contrary to AT&T's assertions about *General Electric Co. v. Gilbert,* 429 U.S. 143, 136-40 (1976), pregnancy discrimination was not "perfectly legal" in the 1960s and 1970s when—notwithstanding the enactment of Title VII's ban on sex-based employment discrimination in 1964—AT&T's predecessor-in-interest, PT&T, continued to enforce its discriminatory policies of denying service credit for pregnancy leave in excess of 30 days while awarding full credit for all other types of disability leave, and forcing female employees to go out on pregnancy leave even when they were perfectly able to perform their jobs. Indeed, both the EEOC and every Court of Appeals decision prior to *Gilbert* had found that pregnancy-based employment discrimination "[was] always illegal under Title VII" as a type of sex discrimination. *Carter*, 870 F.Supp.at 1443-45; *and see*

Gilbert, 429 U.S. at 146-47 (Marshall, J., dissenting).[4] And less than a year after *Gilbert* was decided, the Supreme Court *itself* significantly narrowed that decision when it found that a form of pregnancy discrimination similar to AT&T's in this case was a UEP under Title VII. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 139-42 (1977) (invalidating policy of depriving women of accumulated seniority when returning from maternity leave). Soon after the PDA took effect, moreover, the Supreme Court noted that the PDA "made clear" what Congress had intended all along: that Title VII's prohibition against sex discrimination was, from its inception, intended to apply to pregnancy discrimination. *Newport News Shipbuilding & Drydock Co. v. EEOC,* 462 U.S. 669, 678-79, n.17 (1983).

AT&T's further claim that *Pallas* created new obligations or liabilities with respect to transactions already "completed" when the PDA was enacted, focuses on the wrong "transactions" and ignores the law governing its conduct both before *and* after the PDA took effect. In essence, AT&T contends that once the Plaintiffs completed their pre-PDA maternity leaves, and AT&T "did the math" to determine

[4] The EEOC's 1972 Sex Discrimination Guidelines, *adopted long before the PDA*, explicitly mandated equal treatment of pregnancy-related medical conditions and other temporary disabilities in the accrual of seniority and other employee benefits. 37 Fed.Reg., No. 66 (April 5, 1972). In 1977, the Supreme Court upheld these Guidelines, *Satty*, 434 U.S. at 142, n.4, and EEOC still interprets Title VII the same way. 29 C.F.R.§1604.10; App.A to §1610.11. Indeed, EEOC interprets Title VII to prohibit employers from using discriminatory *pre-PDA* pregnancy leave rules to determine *current* retirement benefits. EEOC Compliance Manual, "Employee Benefits," http://www.eeoc.gov/policy/ocs/benefits.html#B.%20Retirement%20Benefits%20(PDA), No. 915.003 (October 3, 2000; visited March 19, 2006).

their NCS dates upon return to work, Plaintiffs were instantaneously barred from receiving any pension or termination benefits based on the time in excess of 30 days that they were out on pregnancy leave.[5] This is simply untrue. AT&T's calculations of Plaintiffs' NCS dates in the 1960s and 1970s were *not* determinations of their rights under the relevant Pension Plans, *i.e.*, those in force in the mid-1990s and later, or of their eligibility for benefits under termination plans that did not even exist at the time.

The majority and AT&T also ignore the fact that AT&T is not required to, but simply *elects* to use a facially discriminatory device—NCS dates—as a *surrogate* measure of the real criterion for determining the value of pension and termination benefits: *i.e.*, the employees' TOE. There is no dispute that AT&T has, and always has had, ample authority and discretion to adjust the Plaintiffs' NCS dates, for purposes of its pension and termination benefits programs, to ensure equal treatment of all its employees with respect to service credit for pre-PDA disability leaves. It has simply refused to do so.

While AT&T's calculation of Plaintiffs' NCS dates may have deprived them of certain seniority-based perquisites (*e.g.*, priority in job bidding and shift

[5] The majority similarly skews the retroactivity analysis by focusing on a phantom claim—one not raised or argued by Plaintiffs—that the discrimination in this case is between women who took pre-PDA pregnancy leave and women who took post-PDA pregnancy leave. Slip op.at 2302-03. The discrimination targeted in Plaintiffs' complaint "occurs" when AT&T calculates their pensions and other benefits upon retirement or termination of employment, whereupon women who took pregnancy-related leaves prior to 1979 are treated less favorably than employees who took pre-PDA leave for other temporary disabilities.

assignments) both before and after the PDA was enacted, Plaintiffs' rights to receive *pension and termination benefits* were not fixed or determined until the mid-1990s or later, when they reached retirement age or otherwise qualified for benefits under AT&T's Pension Plans, the VRIP, or the VTP. Thus, it was not until AT&T had to determine Plaintiffs' "exit" benefits based on their TOE, and chose to apply its facially discriminatory NCS system, that there was any "transaction" involving an injury that could form the basis for a claim under Title VII or the PDA. *Pallas,* 940 F.2d at 1327 (claim could not have been brought earlier); *see also Maki,* 383 F.3d at 744-45; *Auerbach v. Bd. of Educ.*, 136 F.3d 104, 109 (2nd Cir.1998) (dismissing as "unripe" claims that retirement plan was discriminatory because employees had yet to retire); *Stewart v. M.M.&P. Pension Plan*, 608 F.2d 776, 784-85 (9th Cir.1979) (dismissing suit against pension plan because plaintiff had not retired); *Spirt v. Teachers Ins. & Annuity Ass'n,* 691 F.2d 1054, 1057-58 (2d Cir.1982) (1974 challenge to pension plan adopted in 1952 was timely filed after benefits were denied).

AT&T's claim that *Pallas* "clearly upset settled expectations" that the 1979 amendments to the service crediting rules would have only prospective effect is equally unavailing. In light of the unanimous decisions of the Courts of Appeals that preceded *Gilbert*, the Supreme Court's decision in *Satty* in 1977, the consistent interpretation of Title VII in the EEOC Guidelines since the early 1970s, the floor

debate on the PDA in 1978, the Supreme Court's decisions in *Bazemore* in 1986 and *Lorance* in 1989, this Court's decision in *Pallas* in 1991, the enactment of §706(e)(2) in 1991, the decision in *Carter* in 1994, and the settlements in *Bell Atlantic* and other Bell System cases, it is utterly disingenuous of AT&T to argue that it *ever* had "settled expectations" that it was not required to give full service credit for pre-PDA pregnancy leaves when making pension and termination benefits determinations—as it always has for employees who took pre-PDA leave for other temporary disabilities.

At bottom, it is irrelevant whether AT&T's pre-PDA service crediting system violated Title VII, or whether Congress intended the PDA to be retroactive. AT&T is *not* being held liable for limiting Plaintiffs' service credit for pregnancy-related leave in the 1960s and 1970s, or for the loss of any employment opportunities or benefits suffered at that time. Rather, Plaintiffs' claims are based on *current* violations of Title VII—*i.e.*, discriminatory benefit determinations made in and after 1994, in which AT&T *denied* female employees credit for pregnancy-related disability leaves, while *granting* service credit to other similarly situated employees who took disability leave for other medical reasons.

The acts alleged as unlawful here are AT&T's decisions denying equal benefits when the Plaintiffs retired or were terminated *in the mid-1990s and thereafter*—decisions made *long after* the PDA came into effect. Thus, it is legally

irrelevant that AT&T thought it was allowed to discriminate against pregnant employees before the PDA, because *after* the PDA the company was legally obliged to treat pregnancy like any other temporary disability. It is this crucial distinction that was recognized in *Pallas,* 940 F.2d at 1326-27. Indeed, the decisions challenged in this case were made more than 15 years *after* Congress declared that pregnancy discrimination was *and always had been* illegal under Title VII, and several years after Congress admonished the Supreme Court that intentionally discriminatory seniority systems can be challenged whenever they are applied to individual employees, *whether or not* the discriminatory effect was facially apparent, and *whether or not* it was challenged when it was adopted by the employer. In short, Plaintiffs are not trying to impose liability on AT&T for acts that took place before the PDA; they seek relief only for its post-PDA decisions.

III. CONCLUSION

For these all the foregoing reasons, Plaintiffs respectfully request that this Court grant their petition for rehearing en banc.

Dated: March 22, 2006

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel for the Plaintiffs and Appellees declares that there are no other cases related to this case of which we are aware.

Dated: March 22, 2006

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached Petition for Rehearing En Banc of Plaintiffs and Appellees Noreen Hulteen, Eleanora Collet, Linda Porter, and Elizabeth Snyder, and Communications Workers of America, AFL-CIO, was prepared with a proportionately spaced font, with a typeface of 14 points or more, and contains 4,197 words.

Respectfully submitted this 22nd day of March, 2006.

M. Suzanne Murphy T.F.

M. Suzanne Murphy

91827/414979

Case No. 04-16087
Decision filed March 8, 2006
(Plager, J., and Trott, J.; Rymer, J. Dissenting)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOREEN HULTEEN, ET AL.,
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v.

AT&T CORPORATION,
Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
No. CV-01-01122-MJJ

The Honorable Martin J. Jenkins

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April 14, 2006

INTRODUCTION

The panel majority correctly concluded that *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), is no longer controlling law in light of *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and its progeny. As this Court and other courts of appeals have recognized, *Landgraf* is a landmark decision that altered the legal landscape by reconciling previously conflicting lines of Supreme Court authority on statutory retroactivity. In fact, other Ninth Circuit panels have relied on *Landgraf* to revisit earlier panel interpretations of statutes unconstrained by principles of *stare decisis*. Plaintiffs' suggestion that *Landgraf* is not sufficiently "on point" ignores these decisions, as well as the Supreme Court's decision in *Lockheed v. Spink*, 517 U.S. 882 (1996), which resolved the same issue as *Pallas*, and did so in a manner that cannot be reconciled with *Pallas*.

Moreover, under the principles announced in *Landgraf*, it is clear that *Pallas* gave improper retroactive effect to the Pregnancy Discrimination Act of 1978 ("PDA"), 42 U.S.C. § 2000e-2(k). *No* member of the panel accepted plaintiffs' arguments that, under now-governing retroactivity standards, *Pallas* correctly found a "current" violation of PDA based on "facial discrimination." Accordingly, based on this Circuit's established rule mandating reconsideration of precedent in light of supervening Supreme Court authority, the panel properly declined to

follow *Pallas*, and instead decided this case based on the principles announced in *Landgraf*. *See Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc).

In short, the panel majority did not overlook or misapprehend any point of law or fact, *see* Fed. R. App. P. 40(a)(2), let alone "[f]lou[t] the standards" of *Miller v. Gammie*, "controlling Supreme Court authority," or "the will of Congress." Pet. at 3. Indeed, Judge Rymer *agreed* with the majority's retroactivity analysis; she simply did not believe that *Pallas* is "*so* irreconcilable" with *Landgraf* that a panel can disregard *Pallas*'s holding. Slip Op. at 2314 (emphasis added). En banc review is plainly not warranted where all members of a panel believe a prior decision is incorrect, and they differ only in their assessments of *how* irreconcilable that decision is with current law. This Court should decline plaintiffs' invitation to create an unwarranted conflict with the decision of the Seventh Circuit by overturning a manifestly correct retroactivity analysis.

ARGUMENT

I. The Panel Majority Correctly Concluded That *Pallas* Necessarily Gave The PDA Impermissible Retroactive Effect.

Like this case, *Pallas* involved claims under the PDA that challenged the Net Credited Service ("NCS") system used by the former Bell System and its legacy companies. The NCS system is a record-keeping system that calculates a date used to measure an employee's term of employment, which is then used for various job-related purposes, such as determining pension benefit levels. Joint

Stipulation of Facts ¶¶ 18-19. Neither the NCS system nor any NCS date refers to gender or pregnancy. While the leave policies AT&T used *before* the PDA took effect drew distinctions based on pregnancy, those policies were promptly changed to comply with the PDA.[1] Since that Act took effect, the NCS system has simply relied on NCS dates that were calculated under AT&T's pre-PDA policies.

The NCS system works as follows. If employee A began work on January 1, 1974, and took a 90-day paid disability leave in 1975, she accrued service credit for the full 90 days and her NCS date remained January 1, 1974. If employee B began work the same day and took a 90-day pregnancy leave in 1975, her leave was treated as personal under the leave policies then in effect, she received service credit only for 30 days of leave, and her NCS date was therefore moved forward 60 days to March 2, 1974. Under *General Electric Co. v. Gilbert*, 429 U.S. 125, 136 (1976), the denial of full service credit to B and the resulting adjustment of her NCS date were lawful. If employee C began work the same day and took a 90-day personal leave in 1975 to finish her college degree, she also received only 30 days service credit, and her NCS date was also moved forward to March 2, 1974.

Pallas held that, after the PDA took effect, continued reliance on NCS dates that had been calculated under AT&T's pre-PDA pregnancy-leave policies was "facially discriminatory" and a "current" violation of the PDA. Plaintiffs invoked

[1] Thus, there is no merit to plaintiffs' incomprehensible claim that "AT&T freely admits that it continues to discriminate on the basis of pregnancy." Pet. at 7.

these conclusions more than 50 times before the panel, *see* Slip Op. at 2305, and do so repeatedly in their petition. *See* Pet. at 1-2, 4-8, 14-16. But, as the majority in this case correctly held (and the dissent conceded), *Landgraf* now makes clear that *Pallas*'s conclusions themselves rest on retroactive application of the PDA.

Landgraf established that a statute has retroactive effect if, among other things, it "creates a new obligation," "changes the legal consequences of acts completed before its effective date," or "gives a quality or effect to acts or conduct which they did not have . . . when they were performed," 511 U.S. at 269 n.23 (internal quotation marks omitted). As *Pallas* construed it, the PDA does all of these things. Prior to the PDA, Pacific Bell could lawfully deny employee B full service credit for time spent on pregnancy leave and adjust her NCS date accordingly. Thus, the day *before* the PDA took effect, it was lawful to rely on B's March 2, 1974, NCS date when making pension and other seniority-based benefit decisions. Under *Pallas*, however, a decision to rely on that same NCS date for that same purpose one day *after* the PDA took effect is "facial discrimination" and a "current" violation of the PDA. As *Pallas* construed it, therefore, the PDA "create[d] a new obligation"—*i.e.*, it required Pacific Bell to give full service credit for pre-PDA pregnancy leaves when, prior to the PDA's effective date, Pacific Bell was under no such obligation. Similarly, as construed by *Pallas*, the PDA "change[d] the legal consequences of acts completed before its effective date"—

i.e., a service credit calculation that did not give rise to legal liability before the PDA did give rise to such liability afterward. And, as *Pallas* construed it, the PDA "g[ave] a quality or effect to acts or conduct which they did not have . . . when they were performed"—*i.e.*, previously lawful NCS date calculations became unlawful.

Indeed, the reasoning in *Pallas* confirms that it gave the PDA retroactive effect. *Pallas* deemed Pacific Bell's actions "not facially neutral" on the ground that "[t]he system distinguishes between *similarly situated* employees: female employees who took leave prior to 1979 due to a pregnancy-related disability and employees who took leave prior to 1979 for other temporary disabilities." 940 F.2d at 1327 (emphasis added). Absent retroactive application of the PDA, however, these two groups were *not* "similarly situated": Employees in the latter group were entitled to accrue seniority for the duration of their pre-PDA disability leaves, while (under AT&T's lawful pre-PDA leave policies) employees in the former group (like employees who took unpaid leave to finish college) were not entitled to accrue seniority for the duration of their pre-PDA leaves. *Pallas* concluded that the different treatment of these two groups "facially discriminates against pregnant women" because Pacific Bell's award of retirement benefits based on employees' NCS dates "adopted, and thereby perpetuated, *acts of discrimination which occurred prior to enactment of the [PDA].*" *Id.* (emphasis added). But, because it was legal to distinguish between these forms of leave

before the PDA, such differential treatment could not constitute pre-PDA "acts of discrimination" that AT&T could "perpetuate" unless the PDA applied retroactively and "change[d] the legal consequences of acts completed before its effective date." *Landgraf*, 511 U.S. at 269 n.23. Thus, as the panel majority in this case correctly recognized (Slip Op. at 2306) (quotation marks and citation omitted):

> [t]he failure to award employees full service credit for their pregnancy leaves could be labeled facially discriminatory only if employees in both groups were similarly situated, e.g., if all were legally entitled to receive full credit for their leaves before the enactment of the PDA. But that would be true only if the PDA were given impermissible retroactive effect.

Plaintiffs cannot escape this fatal problem. They argue that AT&T's pre-PDA leave policies were illegal because "the EEOC and every Court of Appeals decision prior to *Gilbert* had found that pregnancy-based discrimination was always illegal under Title VII." Pet. at 12 (quotation marks and alteration omitted). But *Gilbert* held that "exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." 429 U.S. at 136. And *Gilbert*'s holding—not the lower court decisions it overruled—is the "authoritative statement of what the statute meant *before* as well as after"

Gilbert was decided. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) (emphasis added).[2]

The decision in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), did not disturb that ruling. *Satty* held that *divesting* women returning from pregnancy leave of *previously accumulated seniority* violated Title VII, *id.* at 139. AT&T's pre-PDA leave policies, however, did not do this. *See In re Southwestern Bell Tel. Co. Maternity Benefits Litig.*, 602 F.2d 845, 848-49 (8th Cir. 1979) (rejecting Title VII challenge because the Bell System's pre-PDA leave policy, "unlike the [one] in *Satty*, does not divest employees on maternity leave of seniority accumulated prior to taking leave"); *see also Ameritech Benefit Plan Comm. v. Communication Workers of Am.*, 220 F.3d 814, 823 (7th Cir. 2000) (NCS system's denial of full seniority accrual for maternity leaves was legal before the PDA). Indeed, even *Pallas* recognized that, prior to the PDA, "the law did not require employers to treat pregnant women like temporarily disabled men," 940 F.2d at 1325 (citing *Gilbert*). And the EEOC conceded here that the "denial of service credit to women

[2] Because *Gilbert* established what Title VII meant "from its inception," Pet. at 13, Congress could only change that initial meaning by making the PDA retroactive. But every other appellate court to address the question, including this one, has found that Congress did not do so. *See* Slip Op. at 2301 (citing cases).

on maternity leave *was not unlawful* . . . in [1975]." EEOC Br. at 26 (internal quotation marks omitted; alteration in original; emphasis added).[3]

Shifting ground, plaintiffs argue that the legality of AT&T's pre-PDA leave policies is "irrelevant" because they challenge post-PDA benefit decisions, when AT&T allegedly denied "equal benefits" to two groups of "similarly situated employees"—*i.e.*, women who took pregnancy-related leaves prior to the PDA and employees who took other disability leaves. Pet. at 16. It is undisputed, however, that AT&T did not, "*in the mid-1990s and thereafter,*" *id.*, deny full service credit to women on pregnancy leaves. AT&T denied such credit prior to the PDA, when it was lawful to do so. After the PDA took effect, AT&T granted full service credit to women who took pregnancy leaves, and simply relied on pre-PDA service calculations. As AT&T has shown, and the panel majority correctly held, such reliance is not a "current violation," and does not involve "facial discrimination," because Congress did not give the PDA retroactive effect.

Thus, the majority correctly held that, in light of *Landgraf*, *Pallas* plainly gave the PDA improper retroactive effect. Judge Rymer did not accept plaintiffs' claims to the contrary. *See* Slip Op. at 2310 ("I do not disagree with my colleagues' take on what a correct analysis . . . should look like").

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[3] Given this concession, the EEOC's position that Title VII prohibits reliance on pre-PDA leave calculations when determining current retirement benefits, *see* Pet. at 13 n.4, simply reflects its incorrect view that the PDA has retroactive effect.

II. The Panel Majority Correctly Held That *Pallas* Is No Longer Binding In Light Of Intervening Supreme Court Precedent.

Judge Rymer dissented because she read *Landgraf* "as refining, rather than sea-changing, the landscape." Slip Op. at 2313. But this Court, other courts of appeals and commentators have all characterized *Landgraf* as a "landmark decision." *See, e.g., Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 939 (9th Cir. 2005); *Salahuddin v. Mead*, 174 F.3d 271, 274 (2d Cir. 1999); *In re Minarik*, 166 F.3d 591, 595 (3d Cir. 1999); Michelle D. Land, *Judges' Bench Memorandum,* 20 Pace Envtl. L. Rev. 449, 459 (2002). Although, as Judge Rymer notes, Slip Op. at 2313, *Landgraf* drew on venerable legal sources, prior to *Landgraf* the law on retroactive application of statutes was "fraught with confusion." *U.S. SEC v. Fehn*, 97 F.3d 1276, 1285 (9th Cir. 1996). This confusion resulted from "inconsistencies," *Resolution Trust Corp. v. Bayside Developers*, 43 F.3d 1230, 1235 (9th Cir. 1994)—or what Justice Scalia called an "irreconcilable contradiction," *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 841 (1990) (Scalia, J., concurring)—between two lines of Supreme Court authority. By reconciling these conflicting lines of precedent, *Landgraf* "*altered the legal landscape*," *Jeffries v. Wood*, 114 F.3d 1484, 1494 (9th Cir. 1997) (en banc) (emphasis added), and signaled "a *significant shift* in the manner in which federal courts should analyze questions involving the application of new civil

statutes to conduct that has already occurred," *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1407 (9th Cir. 1995) (emphasis added).

This Court has likewise recognized that, in light of this alteration of the legal landscape, earlier decisions are not binding if they applied statutes in a manner that *Landgraf* now forbids. This is clearly illustrated by a series of cases involving a 1986 amendment to the False Claims Act that eliminated a jurisdictional bar to *qui tam* actions whenever suits were based on information the government already possessed when the actions were brought. Under the 1986 law, there was no bar to suit if the plaintiff, or "relator," was the source of the government's information.

Prior to *Landgraf*, a panel of this Court held that the amendment applied where both the false claim and the relator's disclosure to the government occurred prior to 1986. *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991). Despite this precedent, the panel in *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 813 (9th Cir. 1995), revisited the law's applicability to pre-amendment conduct, noting that *Hagood* "came down before *Landgraf*" and "did not consider, discuss or decide the retroactivity issue." *See id.* at 814. Conducting its own *Landgraf* analysis, *Anderson* concluded that applying the amendment where the false claim was submitted prior to the amendment, but the relator's disclosure was made afterward, involved only prospective application of the new law. *Id.* at 814-15.

In *Lindenthal*, another panel confronted the issue addressed in *Hagood*: whether the new law applied where both the false claim and the relator's disclosure occurred before 1986. 61 F.3d at 1408. Although it discussed *Anderson*, which had in turn discussed *Hagood*, the *Lindenthal* panel likewise conducted its own *Landgraf* analysis. It concluded that such an application of the law caused no impermissible retroactive effect. *Id.*

If *Landgraf* had simply refined settled law, then *Hagood*'s holding that the 1986 amendment applied to pre-amendment conduct should have been binding on the *Anderson* and *Lindenthal* panels. Instead, because *Landgraf* had significantly changed the law, the issue of retroactivity had to be addressed anew, without regard to pre-*Landgraf* circuit precedent.[4] In fact, these panels did not go far enough in applying *Landgraf*: the Supreme Court later reversed a decision that, relying on *Anderson* and *Lindenthal,* applied the new law to pre-1986 conduct. *See Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997).

These cases likewise belie the claim that *Landgraf* is not sufficiently "on point" to justify overruling *Pallas*. Pet. at 4, 9. *Landgraf* did not involve the False Claims Act, let alone "discuss" any prior decision of this Court applying that Act. *Id.* at 4. Yet, the *Anderson* and *Lindenthal* panels recognized that *Landgraf*'s

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[4] *See also PBGC v. White Consolidated Indus., Inc.*, 215 F.3d 407, 413 (3d Cir. 2000) (*Landgraf* is "a supervening change" in law that invalidates prior decisions that "analyzed [a] statute's retroactivity in a way now forbidden by *Landgraf*").

retroactivity principles necessarily controlled over any pre-*Landgraf* precedent. Indeed, in *Miller v. Gammie*, this Court made clear that panels must disregard prior Circuit precedent even when an intervening Supreme Court decision court involves a "closely related, but not identical issue." 335 F.3d at 899.

In all events, one of *Landgraf*'s progeny, *Lockheed v. Spink*, 517 U.S. 882 (1996), resolved essentially the identical issue raised in *Pallas*, and did so in a manner that cannot be reconciled with *Pallas*. *Spink* involved a 1986 law that prohibited employers from excluding new employees over age 60 from participating in their retirement plans. *See id.* at 885. Spink had become a new employee prior to the law's January 1, 1988 effective date, and had been excluded because of his age from participating in Lockheed's pension plan. Although he participated in the plan from 1988 on, he claimed that his pre-1988 years of service had to be used in any benefit calculation made after January 1, 1988, even though his exclusion from the plan prior to that date (like plaintiffs' failure to receive full service credit for pregnancy leaves taken prior to the PDA) had been legal. Like plaintiffs in *Pallas* and this case, Spink claimed that he did not seek "retroactive application" of the new law, but rather that the employer's failure to include his pre-1988 years of service when making a post-enactment benefit determination (like AT&T's failure to include all time spent on pre-PDA pregnancy leaves when making post-PDA benefit determinations) was a current violation. *See* Br. for

Resp. Paul L. Spink, No. 95-809, at 36, *available at* 1996 WL 143283 ("excluding pre-enactment service years . . . constitutes a discriminatory benefit calculation") (capitalization altered); *id.* at 41 (interpreting the law "to prohibit a plan from excluding pre-enactment years of service because of the employee's age at the time of hire simply does not result in a retroactive application of the statute").

The Supreme Court rejected this argument. It held that, because Congress intended the 1986 law to have prospective effect, "for plan years prior to the [January 1, 1988] effective date, employers cannot be held liable for using age-based accrual rules." 517 U.S. at 896. Thus, *Spink* and *Pallas* both involved statutes that made it unlawful to deny seniority for certain reasons (being older than 59; taking pregnancy leave). Lockheed and Pacific Bell both relied, when making benefit determinations after the laws' respective effective dates, on seniority calculations made before those effective dates. *Spink* held that an employer "cannot be held liable" for such reliance absent retroactive application of the new law; *Pallas* deemed such reliance a "current" violation. These rulings are irreconcilable. Contrary to the dissent's view, moreover, *Spink* cannot be distinguished on the theory that it decided only that Congress had not authorized retroactive application of the new law. Slip Op. at 2315-16. That determination alone did not resolve the case, because Spink claimed that applying the new law to benefit calculations made after the law took effect was a current violation.

In recognizing that *Lockheed* and *Spink* invalidated *Pallas*'s interpretation of the PDA, the majority did not disregard *Bazemore v. Friday*, 478 U.S. 385 (1986), or erroneously deem it overruled by *Landgraf*. Pet. 3-4, 6. Rather, it is plaintiffs who ignore the difference between continuing a practice after it has been outlawed, and merely giving post-enactment effect to pre-Act decisions that were legal when made. *Bazemore* did not involve a discriminatory pay structure that was dictated by pre-Act seniority decisions that locked in pay disparities. Instead, the employer simply paid "less to a black than to a *similarly situated* white," 478 U.S. at 395 (emphasis added)—*i.e.*, a white worker who could claim no seniority-based right to higher pay. Thus, the Court's holding "in no sense gives legal effect to the pre-1972 action, but . . . focuses on the present salary structure, which is illegal if it is a mere continuation of the pre-1965 discriminatory pay structure." *Id.* at 397 & n.6 (Brennan, J., concurring in part).

In *Bazemore*, the employer could have avoided liability by paying white and black employees the same wages for the same work after the law took effect; it was not required to remedy pre-Act pay disparities. Under *Pallas*, however, merely ceasing a practice once it was outlawed was not sufficient to avoid liability. After the PDA took effect, Pacific Bell treated pregnancy leaves the same as non-pregnancy leaves, but *Pallas* held that Pacific Bell was required to remedy pre-PDA leave-treatment disparities by awarding service credit for pregnancy leaves

taken before the PDA. Nothing in *Bazemore* compels such a result. And under *Landgraf*, such a duty confirms that the PDA is being applied retroactively.[5]

Finally, the petition should be denied because plaintiffs are asking this Court to create an entirely unwarranted conflict with the Seventh Circuit, which rejected a PDA challenge to Ameritech's use of the NCS system and its reliance on NCS dates calculated in accordance with pre-PDA leave policies. Like the majority here, the Seventh Circuit recognized that the PDA does not have retroactive application. *Ameritech Benefit Plan Comm.*, 220 F.3d at 823.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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[5] Nor is there any merit to plaintiffs' hyperbolic claim that the majority flouted "the will of Congress" as expressed in § 706(e)(2) of Title VII. Pet. at 3. That provision addresses *facially neutral* seniority systems "adopted for an intentionally discriminatory purpose." 42 U.S.C. § 2000e-5(e)(2). *Pallas* said nothing about such seniority systems because it erroneously found the NCS system *facially discriminatory*. Indeed, plaintiffs' claim that the NCS system is a facially neutral but intentionally discriminatory system, Pet. at 2, is at odds with their repeated reliance on *Pallas*'s "finding" of facial discrimination. It is also disingenuous—there is *no evidence* that the NCS system was adopted for an intentionally discriminatory purpose. *See* Excerpt of Record R.58. Finally, it is also barred. While claims challenging an "intentionally discriminatory" but facially neutral seniority system no longer accrue only when the system is adopted, *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), § 706(e)(2) applies only prospectively. *See Chenault v. United States Postal Serv.*, 37 F.3d 535, 539 (9th Cir. 1994) (statute that lengthens a limitations period may not revive claims otherwise barred under the old statutory scheme). Thus, any claim that the NCS system was an intentionally discriminatory but facially neutral system was time-barred before § 706(e)(2) was enacted, and was not resuscitated by that statute.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure Petitioner AT&T Corp. ("AT&T") respectfully submits this revised corporate disclosure statement.

AT&T provides telecommunications and other services. AT&T is a wholly owned subsidiary of AT&T Inc. No entity owns ten (10) percent or more of the stock of AT&T Inc.